

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

RECEIVED

NOV 25 1996

Federal Communications Commission
Office of Secretary

In Re)
Petition of Cellular)
Communications of Puerto Rico, Inc.) RM-8897
for Rulemaking)

To: The Commission

DOCKET FILE COPY ORIGINAL

**JOINT COMMENTS OF MILLER COMMUNICATIONS, INC.
AND SKYWAVE COMMUNICATIONS PARTNERS**

Miller Communications, Inc. ("Miller") and Skywave Communications Partners ("Skywave"), by their attorneys, hereby submit their comments in response to the Commission's October 24, 1996 Public Notice. The Notice solicited Comments on the question of whether cellular applications filed prior to July 26, 1993 should be lotteried in accordance with the procedures in effect at the time they were filed or, rather, be decided by competitive bidding.

Miller and Skywave are applicants in the markets which have come available for re-licensing due to the disqualification of the original selectee. In addition, Miller and Skywave are Petitioners in Algreg Cellular Engineering (CC Docket 91-142). In that case, currently on appeal to the full Commission, some 20 applicants have been disqualified as a result of their participation in a "risk-sharing" scheme which had the effect of skewing the lottery very significantly in favor of the participating applicants.

No. of Copies rec'd
List ABCDE

0214
WT

The evidence regarding the existence and operation of the risk-sharing scheme was voluminous and complex. Petitioners brought the original evidence of wrong-doing to the Commission's attention, generating a hearing designation order to inquire further into the facts and circumstances. Named as parties to that proceeding, Petitioners undertook an all-out effort to assist the Common Carrier Bureau staff in eliciting full particulars of the scam. Petitioners conducted and paid for more than a score of depositions, then participated daily in a hearing that lasted some four months. The hearing record alone ran to thousands of pages. It has been estimated that the Petitioners to date have expended well in excess of a million dollars to assist the Commission in driving the stake into the heart of this unlawful scheme. In the end, these efforts by the Commission's staff and Petitioners was justified: both the Administrative Law Judge and the Review Board disqualified the offending applicants, thus redeeming and restoring the integrity of the licensing process.

A key element of this entire proceeding was the objective of restoring the integrity of the lottery which had been corrupted by the risk-sharing scheme. All of the original applicants for these facilities, including Miller, Skywave, the other Petitioners, and scores of other innocent applicants, filed their applications in the good faith belief that the Commission would hold a fair lottery free from any taint and with each applicant having an equal chance. Because of the now-exposed scheme, that did not happen.

All of these years of litigating the significance of the risk-sharing scheme have been about one thing: ensuring a fair lottery. Having now proven that the original lottery was not fair, it is essential that the Commission hold a new lottery among the original, qualified applicants. Any other course would be a gross disservice to those applicants who have expended enormous personal resources in defense of the Commission's lottery rules.

Apart from the unique circumstance presented by the Algreg case, there are strong equitable considerations which apply not only to the Algreg litigants but to all applicants in the original lottery pools. These applicants filed their applications as much as seven years ago on the basis of the then current rules. The single most compelling dictate of fair play - whether on the sports field, in the political arena, or in tribunals of justice - is that you do not change the rules in the middle of the game. Here that commandment is especially illuminating since it was the corruption of those rules which has led, ultimately, to the need to undertake a re-licensing of the affected markets.

There is a corollary to that equitable principle which bears note here. When these applications were originally filed, the FCC did not have authority to auction radio licenses. It is only the excruciatingly slow pace at which these case have proceeded through the Commission which has permitted the possibility of auctions to even be available. The dilatoriness of

administrative action has worked to the extreme detriment not only of the public in the affected communities (who have had only "interim" operators for several years) but also of the applicants themselves who have embedded significant costs in the application process with no final result on the horizon. If the Commission proceeds to auction these licenses, it will in fact have rewarded itself for its own inefficiency by taking advantage of a change in the governing statute which could not possibly have been applied back in the late '80's. It would plainly be a poor result from a public interest standpoint for an administrative agency to reap a windfall benefit from its own delay in processing applications. Such a result would, for example, encourage the Commission to delay action on comparative criteria for broadcast applicants pending the receipt of auction authority -- something the Commission would surely not even consider. Resort to an auction here fairly invites administrative agencies to shirk their primary licensing responsibilities in the hope that Congress will change the law.


For the reasons set forth above, Petitioners respectfully request that the Commission reject any attempt to license these cellular markets through competitive bidding. Rather, the Commission should proceed promptly to finalize the dismissal of the disqualified applicants in all markets and hold new lotteries among the original lottery pool.

5

Respectfully submitted,

Miller Communications, Inc. and
Skywave Communications Partners

By:


Donald J. Evans
Their Attorney

Evans & Sill, P.C.
1627 Eye Street, N.W., #810
Washington, D.C. 20006
(202) 293-0700

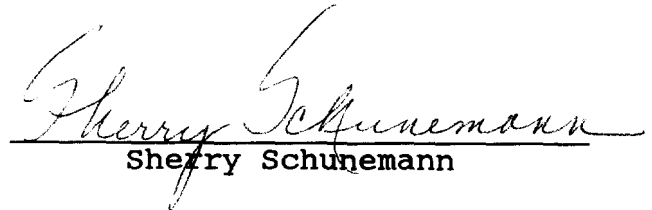
November 25, 1996

CERTIFICATE OF SERVICE

I, Sherry L. Schunemann, do hereby certify that on this 25th day of November, 1996, a copy of the foregoing "Joint Comments of Miller Communications, Inc. and Skywave Communications Partners, was mailed by First Class U.S. Mail, postage prepaid, to the following:

International Transcription Service, Inc.
2100 M Street, N.W.
Washington, D.C. 20036

Mr. Eric J. Bash
Federal Communications Commission
Wireless Telecommunications Bureau
Commercial Wireless Division
Legal Branch
2025 M Street, N.W., Room 7130
Washington, D.C. 20554
(Via Hand Delivery)


Sherry Schunemann